Nos. 78-432, 78-435, 78-436

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, PETITIONER

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL
CORPORATION, AND UNITED STATES OF AMERICA,
RESPONDENTS

KAISER ALUMINUM & CHEMICAL
CORPORATION, PETITIONER,

v.

BRIAN F. WEBER, RESPONDENT

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

May an employer and labor union, solely in order to achieve a desired ratio of minority workers in craft positions at a manufacturing plant and in the absence of any prior discrimination against the minority workers at that plant, institute a racial quota for admission to craft training programs that is preferential to members of minority groups and discriminates against whites, where job seniority would ordinarily determine entry into the training programs?

STATEMENT OF THE CASE

In order to achieve a desired ratio of minority workers in craft jobs at a manufacturing plant in Gramercy, Louisiana, petitioners, Kaiser Aluminum & Chemical Corporation ("Kaiser") and United Steelworkers of America ("USWA"), instituted a racial quota requiring that at least 50 per cent of all applicants selected into craft training programs be members of minority groups. Brian F. Weber and the class of similarly situated white workers at the Gramercy plant brought an action under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981, alleging that the 50 per cent racial quota discriminated against them unlawfully. An injunction was granted in favor of the plaintiffs by the United States District Court for the Eastern District of Louisiana[1] and this decision was af-

1 *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761 (E.D. La., 1976).

firmed by the United States Court of Appeals for the Fifth Circuit.[2]

1. Application of the agreement between Kaiser and USWA.

The racial quota of Kaiser and USWA was instituted as part of the 1974 Labor Agreement executed by the parties. The agreement provided in part that "certain goals and time tables" would be established by a joint committee to facilitate the achievement of a "desired minority ratio" in existing trade, craft and assigned maintenance classifications at various Kaiser plants, including the Gramercy Plant.[3] The percentage "goal" established by the joint committee for the Gramercy Plant was 39 per cent, based on the percentage of minority workers in the available work force in the area.[4] The agreement stated:

> [A]t a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . . .[5]

2 *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216 (5th Cir., 1977).

3 App., 137.

4 App., 60.

5 App., 137.

Kaiser estimates that the 50 per cent quota must exist for at least 30 years in order to reach the 39 per cent goal.[6] If and when the goal is reached, a percentage quota reflecting the percentage of minority workers in the overall labor force will be established for the training programs.[7] This quota is expected to be used indefinitely to assure perpetual "minority representation in the plant that is equal to that representation in the community work force population."[8]

Apart from the racial quota imposed by Kaiser and USWA, the sole qualification for entry into the training programs is the seniority of applicants.[9] This seniority is determined on the basis of "length of employment at the plant and is not affected by departmental or job seniority. All workers at the plant are included in this seniority line."[10]

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6 Brief for Petitioner, Kaiser Aluminum & Chemical Corporation in No. 78-435 (hereinafter cited as "Brief of Kaiser") at 52-53 n.135, Exhibit A.

7 App., 69.

8 App., 69. This statement was made by Dennis E. English, industrial relations superintendent at the Gramercy plant. He also said:

> Once the goal is reached of 39 percent, or whatever the figure will be down the road, I think it's subject to change, once the goal is reached in each of the craft families, at that time, we will then revert to a ratio of what that percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage. App., 69.

9 App., 73-74, 127.

10 App., 128.

Respondent, Brian F. Weber, was employed as a lab analyst at the Gramercy works of Kaiser. In April, 1974, company bids for the on-the-job training programs in the instrument repair, general repairman and electrician craft categories were posted by Kaiser.[11] Pursuant to the standard procedure of Kaiser and USWA, applicants were to be selected for those programs on the basis of seniority.[12] However, a condition of the bid was that at least half of the persons selected as prospective trainees would be applicants who were members of minority groups.[13] Thus, applicants for the training programs were selected from racially separated seniority lines. Selection was made one-for-one "on the basis of their seniority, within respective groups of bidders from their race."[14]

Mr. Weber and other white members of the plaintiff class applied for the training programs. However, members of minority groups with less seniority than white employees were selected preferentially by Kaiser for these programs to meet the established quota of at least 50 per cent minority representation.[15] In each instance of selection of a minority applicant, one or more

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11 App., 127.

12 App., 73-74, 127.

13 App., 127.

14 App., 127.

15 App., 127-28. One black trainee and one white trainee were selected for the instrument repair training program, one black trainee and one white trainee were selected for the electrician training program, and three black trainees and two white trainees were selected for the general repairman training program. App., 127-28.

white workers with greater seniority than members of minority groups selected for the training programs were denied entry into the training programs solely on the basis of the racial criterion.[16]

Subsequently, company bids were posted for additional craft training openings in the air conditioning mechanic,[17] insulator and carpenter categories.[18] The selections for these openings were made on the basis of the 50 per cent minority requirement. One of the bids barred applications by any white employee, as the bid was specifically limited to minority employees only.[19] In all, in the period April through October, 1974, seven minority employees were selected for positions in training programs in preference to white employees pursuant to the 50 per cent quota.[20]

2. Desirability of the craft positions.

The craft training programs offered by Kaiser presented significant opportunities to the unskilled workers at the plant. For years, USWA had negotiated

16 App., 127-28.

17 App., 127. This bid was posted on May 7, 1974. A white bidder with senior status was selected for this training program; this selection re-established a 50-50 racial balance in the training programs.

18 App., 127. One black trainee and one white trainee were selected for the carpenter training program and one black trainee was selected for the insulator training program. App., 127-28.

19 App., 46, 128.

20 App., 128.

to obtain the opportunity for its members to obtain craft training.[21] Entry into the training programs would provide the opportunity for a worker to "better [himself] financially"[22] by obtaining better hourly pay and overtime wages.[23] In addition, the benefits associated with being a craftsman are greater than for unskilled jobs, including the opportunity primarily to work the day shift.[24] Mr. Weber and other workers also perceived the craft positions to be desirable to provide job security.[25] Mr. Weber said there is "much more job security as a craftsman than any other job."[26]

The craft jobs available at the Gramercy plant required heavy industrial skills that are acquired only after substantial training and schooling.[27] In the crafts generally in the United States, the necessary skills are acquired only after apprenticeship programs lasting up to five years.[28] Many apprenticeship programs are registered with state apprenticeship councils or the Bureau of Apprenticeship and Training of the Department of Labor.[29] These programs must identify certain

21 App., 64, 85.

22 App., 33.

23 App., 33.

24 App., 33.

25 App., 33, 129.

26 App., 33. The parties stipulated that craft jobs "are considered desirable and advantageous for financial, job security and other reasons." App., 129.

27 App., 67.

28 See, e.g., The National Apprenticeship Program (U.S. Dept. of Labor, Employment and Training Admin., Rev. 1976).

29 *Id.* at 4.

minimum standards to be met, including a guarantee of equal opportunity, work processes to be used in on-the-job training, planned related instruction, proper evaluation and supervision, and a "term of apprenticeship that is consistent with training requirements as established by industry practice . . . ."[30]

The craft positions at the Gramercy plant required special skills necessary for the performance of duties in the heavy industrial setting.[31] The electrical circuitry carrying high voltages, potentially dangerous industrial chemicals, large and complex industrial equipment and machinery, and sensitive meters and indicators require specialized knowledge and training to adequately and safely perform the necessary tasks.[32] In the training programs at issue in this case, Kaiser provides two and one-half to three and one-half years of on-the-job heavy industrial training and about "four hours of schooling per week by a training supervisor."[33] In addition, the company requires each trainee to take and pass from 40 to 66 home courses provided

30 *Id.* at 5.

31 As a result, Kaiser required prior heavy industrial experience for new hires. App., 70.

32 Kaiser maintains job descriptions for each of its craft positions. A sample "primary function" is that of the instrument repairer:

> To layout wiring, inspect, install, test, repair, service, maintain, and wire plant indicating and recording, instruments, meters, high voltage protective devices, gauges, relays, thermometers and pyrometric equipment.

33 App., 67.

by the International Correspondence School.[34] Thus, the training programs provide a concentrated course of study and training for employment in the industrial crafts.

3. Impact on the white workers.

The effect of the racial quota instituted by Kaiser and USWA was to create separate black and white seniority lines for entry into the training programs. As stated by Dennis E. English, industrial relations superintendent at the Gramercy plant, "in effect [separate seniority lines are created] because you skip the whites to get the blacks, if necessary."[35] In many cases, black bidders were selected despite substantially greater seniority held by white bidders. One white employee who testified that he was denied entry into the training programs, Fortune H. Maurin,[36] possessed more than 16 years seniority at the time of the trial.[37]

The effect of the 50 per cent quota was to alter the traditional criterion, seniority, for entry into the craft training programs.[38] Because proportionately more white workers than minority workers are employed at the Gramercy plant and have obtained senior status, a

34 App., 67.

35 App., 75.

36 Mr. Maurin's name is incorrectly spelled "Moran" in the trial transcript, but appears correctly as F. H. Maurin in the exhibits. App., 54-59, 156-64.

37 App., 54.

38 App., 101.

50-50 racial quota deprives whites of their seniority rights.[39] Thomas M. Bowdle,[40] director of equal opportunity affairs of Kaiser, conceded this point. He said:

> Q. So, you recognized that when you waive the number one requirement, the seniority requirement, and you take a black with less seniority than a white, you're thereby favoring the black on grounds of race, is that right?
>
> A. He's getting preferential treatment, that's correct.[41]

Mr. Bowdle also conceded that "the black is being selected for a program primarily on the basis of his race."[42]

The racial quota instituted by Kaiser and USWA, and the perceived effect of race discrimination, had a substantial impact on the white workers of the plant. A "sacred"[43] and objective criterion for advancement and opportunity, seniority, was devalued by the factor of race.[44] Mr. Bowdle stated that there is "no question" that the racial quota "gives . . . minorities, special seniority rights, at the expense of white workers hired

39 App., 75, 101-02.
40 Mr. Bowdle's name is incorrectly spelled "Bouble" in the transcript.
41 App., 101-02.
42 App., 102.
43 App., 99.
44 App., 99, 102.

earlier."[45] In addition, Mr. Weber indicated that the racial quota had a significant impact on white workers and resulted in adverse consequences.[46] Mr. Weber had "been involved with the Union for several years as a trustee [and] as a grievance committee man"[47] and was "presently chairman of the grievance committee."[48] His responsibilities included dealing "with all the hourly people on the plant site . . . with their problems in regard to any contractual violations or other problems they might have."[49] His familiarity with the attitudes of the hourly employees was not challenged.

Mr. Weber stated that "the quota system used by the company has had a very bad effect on the white workers at the plant."[50] One negative impact of the 50 per cent quota was a deterioration in racial harmony. Mr. Weber stated:

> [T]he racial relations of the white worker toward their black counterparts, black employees at Kaiser, have progressively gotten worse because of the fact that they realize that the company and the Union have a program in effect which uses race to promote employees ahead of themselves.[51]

45 App., 105.
46 App., 36.
47 App., 35.
48 App., 35.
49 App., 35.
50 App., 36.
51 App., 36.

Mr. Weber also stated that "the [white] employees feel that the company and the Union are working against them, not for them, in advancement and promotions to jobs that they might better themselves. They feel that they're being held back."[52] He indicated that the racial quota substantially diminishes the loyalty of white workers to Kaiser and USWA and their desire to be productive. He said:

> [I]t takes away from the initiative of the individual employee to do more, to do one step further, to do all of his job in the best way he knows how, because he knows that even no matter how well he does it, he won't be able to be promoted, because of this 50 percent minority requirement of the company.[53]

4. Reasons for the adoption of the racial quota.

The primary reason for the adoption of the 50 per cent quota for selection into the craft training programs was the small percentage of minority workers in craft jobs as compared with the minority labor force as a whole.[54] Prior to the institution of the training programs under the 1974 agreement, only about two per cent of the craftsmen at the Gramercy plant were minority employees.[55] According to Mr.

52 App., 36.
53 App., 37-38.
54 App., 62-64, 137.
55 App., 62, 167.

English, Kaiser and USWA were "striving to obtain . . . a 39 per cent minority population in each of the craft families . . . ."[56] The one-for-one hiring program was the means adopted to achieve this goal.

Kaiser was motivated to adopt the 50 per cent quota in part because of its perception of the wishes of federal contract compliance officers.[57] However, Kaiser was not ordered to implement this action.[58] Kaiser had a substantial economic reason to comply with federal contract compliance suggestions.[59] In addition, Kaiser believed that it was furthering a national social policy by the adoption of the racial quota.[60]

USWA appears to have concurred in the adoption of the racial quota as an affirmative action measure.[61] However, USWA had negotiated for years for the institution of training programs to provide its members with access to craft jobs.[62] In the words of the attorney for USWA, "the Union's efforts were directed towards obtaining additional opportunities for their members,

56 App., 60.
57 App., 83, 92-93.
58 App., 84.
59 App., 77.
60 App., 95. The district court indicated that the racial quota was also adopted to avoid "vexatious litigation," but there was no evidence that any black employees had threatened suit based on the makeup of craft positions at the Gramercy plant. 415 F.Supp. at 765. The agreement was adopted for a number of plants, some of which may or may not have been potential litigation targets.
61 See Petition for a Writ of Certiorari filed on behalf of USWA in this Court, No. 78-432.
62 App., 73.

who were also Kaiser employees, as opposed to creating opportunities for people from the street."[63] Thus, the training programs were instituted to benefit union members, and were not solely an affirmative action measure having incidental benefits for white as well as black workers.

The racial quota was not implemented by Kaiser and USWA to remedy past discrimination, but instead was designed to help uplift the employment status of minority workers as a class.[64] The program was part of a national plan to compensate for the unavailability of minority craftsmen of the type employed by Kaiser.[65] As stated by USWA in its brief,[66] "[t]he program was negotiated without regard to specific conditions at any one plant, and certainly was not based on an assessment of the particulars of the situation at the Gramercy plant."[67] Kaiser believed that it had not discriminated against minority workers at the Gramercy plant.[68] Instead, Mr. Bowdle indicated that the racial quota was necessitated by the adverse impact on minorities of general societal discrimination.[69] Mr. Bowdle stated that "past discrimination in the field of education, job training, et cetera, has created the condition that we have to deal with in terms of minority

63 App., 85.
64 Opinion of the district court, 415 F.Supp. at 765.
65 App., 92-94, 99-100.
66 Brief for Petitioner, United Steelworkers of America, AFC-CIO-CLC (hereinafter cited as "Brief of USWA").
67 *Id.* at 5.
68 App., 108, 99.
69 App., 99-100.

craftsmen."[70] These factors, according to Mr. Bowdle, have also led to low minority ratios "for lawyers, for doctors, for engineers."[71]

While Kaiser believed on the basis of the "sum total of our experience"[72] that the class of blacks generally has suffered societal discrimination, no effort was made to identify any individual subjected to societal discrimination.[73] To the extent that the racial quota was designed to rectify past discrimination as well as to achieve a desired statistical ratio, it was based on an assumption concerning minority classes rather than any evidence as to individuals.[74] Indeed, Mr. Bowdle indicated that some blacks may not have suffered societal discrimination, while some whites may have endured this hardship.[75] In this case, the whites whose seniority rights were diluted under the racial quota were no better off than the preferred blacks in terms of craft-preparedness because "all of the whites who were passed over lacked the skills that the blacks lacked."[76] Kaiser did not believe that any of the individuals preferred under the racial quota were ever subjected to employment discrimination by Kaiser.[77] The 50 per

70 App., 99-100.
71 App., 100.
72 App., 100.
73 App., 100.
74 App., 100.
75 App., 101.
76 App., 101.
77 App., 99.

cent quota was implemented "to increase the representation of minorities [in the crafts] that will approximate the participation in the labor market . . . ."[78]

5. Availability of minority craftsmen.

Although the percentage of minority craftsmen at the Gramercy plant was smaller than the minority representation in the labor force overall, it was not smaller than the percentage of skilled heavy industrial craftsmen in the Gramercy area. The evidence established that "[t]he available supply of trained craft and trade personnel available for hire by the company as new employees has been, and remains to the present time, almost entirely made up of white males."[79] Mr. English said that craftsmen with heavy industrial skills were not available: "Once again, we can advertise all we want, and look as hard as we can look, and they just aren't available."[80] He agreed that there might be "as little as one or two per cent minority craftsmen in St. James and St. John's parrishes (sic)."[81] Mr. Bowdle stated that the availability of skilled craftsmen was "minimal" and, with ordinary minority recruitment measures, Kaiser would "end up baying at the moon, as it were."[82]

78 App., 105.
79 App., 126.
80 App., 63.
81 App., 76.
82 App., 93.

The means adopted by Kaiser to increase the percentage of minority craftsmen at the Gramercy plant were expensive. The minimum cost of the program of on-the-job training, classroom instruction and home study was $15,000 to $20,000 per trainee per year.[83] Had minority craftsmen been available in the work force at large, Kaiser could have increased the ratio of minority craftsmen at the plant without this cost. Mr. Bowdle stated:

> Q. Now, sir, on a pure economic basis, what would be the cheapest procedure, on the pure cost approach, for obtaining qualified craft employees at the various Kaiser plants?
>
> A. Hire them off the street. If we had adequate supply of craftsmen, candidates coming off the street, that would be the logical way for us to fill our craft jobs, rather than train, because training costs money.[84]

Prior to the institution of the racial quota, Kaiser tried a number of affirmative action methods to attract minority craftsmen. The company set goals and timetables to increase the percentage of minorities in the crafts.[85] In addition, it advertised "in minority-only newspapers" and maintained separate craft application files.[86] According to the industrial relations

83 App., 67-68.
84 App., 95.
85 App., 62.
86 App., 62.

superintendent, "any time the craft vacancies comes up, our first thing, we will go to that craft file and we will try to locate qualified black craftsmen, and we always look for the blacks before the whites. . . ."[87] However, the few minority craftsmen in the area were already employed "because companies like Kaiser anywhere are hiring blacks first, or they're attempting to get blacks on the payroll."[88] The quota was instituted because "the officials of both Kaiser and the Steelworkers realized that something other than the ordinary, look until you find them, had to be done to get blacks into the crafts."[89]

6. Absence of prior discrimination.

The seniority criterion for entry into training programs is based on the date of hire at the plant and is applicable to all employees.[90] Promotional decisions at the Gramercy plant were never based on race.[91] Determinations of seniority for selection into training programs are based on "length of employment at the plant."[92] The Gramercy plant of Kaiser was opened in 1957 or 1958 and discrimination against blacks in hiring has never occurred at this plant.[93] Some "very senior black employees that were hired in and started

87 App., 62-63.
88 App., 63.
89 App., 64.
90 App., 72.
91 App., 72-73.
92 App., 128.
93 App., 77-78.

the plant in 1957-58" have obtained "pretty highly paid top jobs in the plant. . . ."[94]

The district court found that the quota adopted by Kaiser and USWA was *not implemented* "with a view toward correcting the effects of prior discrimination."[95] In addition, it found:

> The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on the job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.[96]

In the district court USWA contended that the statistical showing of a low ratio of minority workers in craft jobs was sufficient to make out a case of past discrimination.[97] This contention was rejected by the district court on the basis of all the evidence.[98] The court of appeals upheld this decision, specifically quoting and approving the finding of the district court that the low percentage of minority craftsmen did not establish past

94 App., 71.
95 415 F.Supp. at 765.
96 415 F.Supp. at 764.
97 Post-Trial Brief of Defendant, United Steelworkers of America AFL-CIO.
98 415 F.Supp. at 764.

discrimination.[99] In the court of appeals, USWA argued that certain training programs of Kaiser existing prior to 1974 that required prior experience may have been discriminatory because minorities lacked this experience.[100] However, a disparate impact of the requirement could not be shown[101] and the district court implicitly found the prior experience requirement to be business related.[102] In addition, the court of appeals held these programs "so limited in scope that the prior craft experience requirement cannot be characterized as an unlawful employment practice, especially when Kaiser was actively recruiting blacks to its craft families during the same period."[103] Thus, both courts found that Kaiser had not discriminated against blacks at the Gramercy plant.

The dissenting judge in the court of appeals, the Hon. John Minor Wisdom, contended that "arguable violations" of Title VII existed, but indicated that "Kaiser did act in good faith [and] made admirable attempts to recruit black craftsmen."[104] In addition, he conceded that "the three potential violations discussed above may not make the district court's finding [of no discrimination] 'clearly erroneous' in the sense contemplated by Rule 52(a), F.R.C.P. . . ."[105]

No party contends that the minority workers preferred under the racial quota are identifiable victims of any past discrimination.

99 415 F.Supp. at 764; 563 F.2d at 224.

100 Prior to the institution of the training programs involving no prior experience requirement in 1974, Kaiser filled its craft positions primarily by hiring fully trained craftsmen from outside the plant. App., 65. However, pursuant to the efforts of USWA to open craft jobs to union members within the plant, Kaiser instituted two partial training programs prior to 1974 in which persons with previous experience were accepted and trained. App., 64-65, 126. The training programs involved acceptance of persons with experience of one year in the carpenter-painter craft from 1964 until 1971, acceptance of applicants with three years experience in the general repairman category from 1968 until 1971, and selection of persons with two years experience in the general repairman craft from 1971 until 1974. App., 126.

In these training programs involving selection of employees with prior experience, it was necessary only for Kaiser to provide training to the employee for the balance of training he did not have. App., 64-65. Thus, the general repairman training program into which employees with three years experience were selected lasted two years; when this program was modified for selection of applicants with two years experience, the training program was lengthened to three years. App., 126. The minimum cost to Kaiser of each year of training, for each trainee, was $15,000 to $20,000. App., 68.

Of 292 craft employees at Kaiser in 1975, only 28 entered through the prior experience training programs. App., 126. These training programs were open to members of minority groups as well as whites with the requisite experience. App., 126. Of the 28 persons who completed the prior experience training programs during their 10 year existence, seven per cent were black. App., 126. This percentage is identical to the ratio of black bidders with no prior experience in the top 28 positions of seniority at the time of the institution of the training programs at issue in this case. App., 156.

101 See n. 100 *supra*.

102 See 563 F.2d at 232 (Wisdom, J., dissenting).

103 *Id.* at 224 n. 13.

104 *Id.* at 232.

105 *Id.* at 232.

7. Procedural background.

This case was filed December 31, 1974 after the issuance of a right-to-sue letter by the New Orleans office of the Equal Employment Opportunity Commission ("EEOC").[106] The national office of the EEOC became aware of the case almost immediately and, prior to the filing of answers by Kaiser and USWA, a request was made by an EEOC staff attorney for copies of the pleadings filed by Mr. Weber.[107] Every important pleading filed by the plaintiffs was sent to this attorney.[108] Copies of the stipulation and six of the seven exhibits were also provided to the EEOC.[109] The EEOC staff attorney discussed the case with counsel for each party.[110] Despite its knowledge of and interest in the case, the EEOC determined not to intervene at the district court level.

The suit of Mr. Weber was filed and certified as a class action.[111] Pursuant to the order of the district court, the Approved Form of Notice was required to be

106 The right-to-sue letter was filed in the district court. Counsel was asked by the district court to investigate the charge and institute suit if appropriate. Thereafter, counsel was formally appointed by the district court to represent Mr. Weber. See App., 4.

107 See Brief for Respondents in Opposition to the Petition for Writs of Certiorari at 5.

108 *Id.* at 5-6.

109 *Id.* The relevant portion of the seventh trial exhibit was contained in the stipulation.

110 App. 30-31.

111 App., 24.

posted "on all employee bulletin boards at the Gramercy, Louisiana works . . . and at the Union Hall [of USWA]."[112] The Approved Form of Notice stated in part that the suit "alleges that the selection policies of the defendants for [on-the-job] training programs, which require the selection of minority applicants to fill at least fifty percent of the available vacancies in the training programs, constitute race discrimination [in violation of Title VII and 42 U.S.C. §1981]."[113]

Although the trial lasted only one day, a large amount of statistical data submitted by Kaiser was stipulated into evidence by the plaintiffs and other facts were also stipulated.[114] A substantial portion of the trial was devoted to reviewing the past employment practices of Kaiser and the reasons for the low percentage of minority craftsmen.[115] The case was under advisement in the district court for more than 14 months.[116] The district court ruled in favor of the plaintiffs, holding that the racial quota violated the

112 App., 25.

113 R., Equal Employment Opportunity in Selection for On-the-Job Training Programs, Approved Form of Notice. Fifth Cir. App., 35. This notice was omitted from the Appendix in this Court.

114 App., 124 *et seq.*

115 See text at nn. 90-105 *supra.*

116 The opinion of the district court was issued June 17, 1976.

rights of white employees under Title VII of the Civil Rights Act of 1964.[117]

The court of appeals affirmed,[118] holding that "[i]t is undeniable that the 1974 Labor Agreement's one-for-one ratio for training eligibility discriminates on the basis of race."[119] The court held that while remedial action designed to correct past discrimination by the employer and restore employees to their "rightful place" is permissible under Title VII, racial preferences are not.[120] The court of appeals concluded:

> Where admissions to the craft on-the-job training programs are admittedly and purely functions of seniority and that seniority is untainted by prior discriminatory acts, the one-for-one ratio, whether designed by agreement between Kaiser and USWA or by order of court, has no foundation in restorative justice,

117 415 F.Supp. at 769-70.

118 563 F.2d 216. The Hon. John Minor Wisdom dissented from the decision.

119 563 F.2d at 223.

120 *Id.* at 225.

> and its preference for training minority workers thus violates Title VII.[121]

8. Published posture of the Government.

The United States and the EEOC (collectively referred to as "the Government"), petitioners, support Kaiser and USWA in this case and contend that the racial quota is valid as a "remedy" for "apparent" violations of Title VII.[122] This position is asserted to be consistent with the current posture of the EEOC under its affirmative action guidelines.[123] In light of this contention, a brief review of the published affirmative action posture of the Government is appropriate.

The affirmative action guidelines[124] were published by the EEOC in an effort to insulate employers from liability to white employees for preferences enacted in favor of minority workers under affirmative action programs.[125] The guidelines were assertedly

121 *Id.* at 226. After the decision of the court of appeals, the United States and Equal Employment Opportunity Commission, which had participated at the appellate level as amici curiae, moved for and were granted permission to intervene as parties. The appellants petitioned for rehearing and suggested rehearing en banc. These petitions were under consideration for more than three months, but were denied on April 17, 1978. 571 F.2d 337.

122 Brief for the United States and The Equal Employment Opportunity Commission (hereinafter cited as "Brief of the Government") at 35-42.

123 Brief of the Government at 40-41.

124 29 C.F.R. Part 1608 (1979).

125 29 C.F.R. §§1608.1, 1608.2 (1979).

promulgated pursuant to Section 713(b) of Title VII,[126] which provides that no person shall be subject to liability in "any action or proceeding based on any alleged unlawful employment practice . . . if he pleads and proves that [he acted] in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission. . . ."[127]

The guidelines require a "reasonable basis" for the preferences granted under the affirmative action plan.[128] However, a reasonable basis does not require an apparent or even arguable violation of Title VII.[129] Indeed, "[i]t is not necessary that the self-analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exist arguable defenses to a Title VII action."[130] The affirmative action is "appropriate" whenever there has been an actual or potential adverse impact on minorities of business practices, when there is a disparity in the minority ratio between the "employer's work force, or a part thereof, and an appropriate segment of the labor force," or when there is limited availability of minority workers in the labor pool.[131]

126 42 U.S.C. §2000e-12(b) (1976).
127 *Id.* §2000e-12(b)(1).
128 29 C.F.R. §1608.4(b).
129 *Id.*
130 *Id.*
131 29 C.F.R. §1608.3 (1979).

The employer is specifically authorized to find a reasonable basis for instituting preferences under the technique set forth in Revised Order No. 4 of the Office of Federal Contract Compliance ("OFCC").[132] This order requires affirmative action whenever "underutilization" is found in any job group.[133] Underutilization means "having fewer minorities or women in a particular job group than would reasonably be expected by their availability."[134] In its utilization analysis, the contractor must consider not only the availability of minorities having the requisite skills in the work force, but also the minority population in the labor area, the size of the minority unemployment force in the labor area, the percentage of the minority work force as compared with the total work force, and other factors.[135]

If underutilization exists, the employer must establishs "goals" that are "specific for planned results" and must meet the goals within designated timetables.[136] A contractor that fails to comply with OFCC requirements may be subjected to loss of its federal contracts, debarment from future federal contracts and other penalties.[137]

The "reasonable action" deemed appropriate under the affirmative action guidelines includes "goals and

132 29 C.F.R. §1608.4(a) (1979); 41 C.F.R. Part 60-2 (1978).
133 41 C.F.R. §60-2.11(b) (1978).
134 *Id.*
135 *Id.*
136 41 C.F.R. §60-2.12.
137 Executive Order 11246, Subpart D, §209.

timetables or other appropriate employment tools which recognize the race, sex or national origin of applicants or employees."[138] Actions adopted in compliance with Revised Order No. 4 will receive the approval and protection of the EEOC guidelines.[139] Preferences may be provided to minority workers or women "regardless of whether the persons benefitted were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination."[140]

The affirmative action guidelines were issued on December 11, 1978, the same day that certiorari was granted in this case. The EEOC denied any conflict between the guidelines and the decision of this Court in *Regents of the University of California v. Bakke*,[141] because in *Bakke* "the university did not assert reliance on any detailed guidance and procedures for crafting an affirmative action plan."[142] The EEOC recognized the conflict between the decision of the Fifth Circuit in this case and the guidelines. Rather than deterring the EEOC from issuing the guidelines, however, the decision of the Fifth Circuit was deemed to make them all

138 29 C.F.R. §1608.4(c).

139 29 C.F.R. §1608.5.

140 29 C.F.R. §1608.4(c).

141 ___ U.S. ___, 98 S.Ct. 2733 (1978).

142 Supplementary Information, Guidelines on Affirmative Action, CCH Employment Practices Guide ¶ 4011.11. The implication of this statement, of course, is that reliance on these or similar guidelines could have changed the decision of the Court in *Bakke*.

the more necessary: "[T]he clarification provided by these Guidelines is necessary because the *Weber* decision may be interpreted to unduly interfere with the range of affirmative action which Congress intended to permit under Title VII."[143]

ARGUMENT

Summary of Argument

1. Regardless of the benign and appealing phrases used by the Government, Kaiser and USWA to describe the 50 per cent racial quota,[144] the operation of the quota presents a classic case of race discrimination against whites. The white workers at the Gramercy plant were denied valuable employment opportunities solely on the ground of race. The 50 per cent quota required the selection of minority applicants over white applicants with greater seniority. This selection system in effect created two separate lines of seniority based on race, artificially diluted the seniority rights of white workers, and required the selection of a greater percentage of minority workers for training programs than the percentage of minority workers employed at the plant. Therefore, the 50 per cent quota is an open and intentional policy of discrimination against white workers.

143 *Id.*

144 E.g., Kaiser describes the racial quota as "voluntary race conscious action." Brief of Kaiser at 30. The Government describes the training programs as "race-conscious training programs." Brief of the Government at 36.

2. Employment discrimination against white workers is just as illegal under Title VII as discrimination against minority employees. Title VII was passed by Congress to prohibit all forms of racial bias in employment. The decisions of this Court and the legislative history of the statute establish that racial quotas of any kind are illegal. These authorities are consistent with the constitutional decisions of this Court, which establish that the reverse racial quota implemented by Kaiser and USWA would be unconstitutional if imposed by the Government.

3. The contentions raised in support of the discriminatory racial quota have no merit. No "apparent" past discrimination existed in this case. No effort was made by Kaiser or USWA to identify any past discrimination. The sole purpose of the 50 per cent quota was to achieve the same ratio of minority workers in the crafts at the Gramercy plant as the ratio of minority employees in the local labor force. A racial preference imposed to achieve a ratio of minority workers in designated jobs, even if this ratio is deemed socially desirable by corporate or union executives or government officials, is a violation of Title VII.

4. The claims that Kaiser had a reasonable basis to believe that past discrimination had occurred are without merit. Kaiser did not enact the racial quota as a "remedy" for past discrimination. Moreover, the low percentage of minority craftsmen at the Gramercy plant was not due to discrimination by Kaiser, but to

the unavailability of minority craftsmen with the requisite skills in the labor force. Kaiser tried a number of affirmative action measures to increase the ratio of minority craftsmen at the plant, but these craftsmen were not available. Furthermore, the speculation as to an arguable or potential discriminatory effect of the prior experience requirement for craftsmen at the Gramercy plant is invalid. The prior experience requirement was neutral on its face and business related. No suggestion has been made of any basis for questioning the business necessity of the prior experience requirement. Kaiser did not believe that the prior experience requirement was invalid in any way, and this requirement was not a justification for the institution of the racial quota.

5. To the extent that Kaiser and USWA believed the 50 per cent quota to be remedial, the "remedy" was for discrimination believed to have been practiced by society at large against the various classes of minorities, not against individuals. No attempt was made to provide a "remedy" to any individual victim of discrimination by Kaiser. None of the individuals preferred under the racial quota was ever subjected to employment discrimination by Kaiser. No attempt was ever made to determine whether any of the preferred minority employees had suffered discrimination at the hands of society. The racial quota embodied a policy of race discrimination against white individuals to achieve the general advancement of minority classes. This policy is unlawful under Title VII.

6. The legislative history of Title VII does not demonstrate an intent to permit the voluntary enactment of racial quotas by private parties to achieve the advancement of minority groups. This interpretation of USWA is drawn from a strained reading of the repeated and vigorous denials of the sponsors of Title VII that the statute would require quotas. The negative inference of USWA is inconsistent with the express prohibition of any race discrimination in the statute, the decisions of this Court, and other statements of the sponsors of Title VII.

7. The discrimination against white employees cannot be validated by the executive orders requiring affirmative action by government contractors. To the extent that the executive orders and the affirmative action regulations of the OFCC conflict with Title VII, the statute prevails. An affirmative action practice that overtly discriminates against non-minority employees is neither reasonable nor legal. In addition, a training program that discriminates on the basis of race is not valid simply because it provides opportunities to the disadvantaged class as well as the preferred class.

8. The racial quota of Kaiser and USWA carries significant adverse consequences. Advancement of minorities solely on the basis of race injures innocent non-minority workers and may lead to increased racial animosity. Moreover, this policy could enhance stereotyped beliefs about minority employees held in the society at large. Furthermore, policies of advancement of employees that are unrelated to qualifications or ability may undermine the incentive of employees to be productive. In addition, the "zone of reasonableness" rule proposed by Kaiser and the Government may have uncontrollable and undesirable consequences. Judicial approval of a rule permitting discriminatory treatment of white workers could lead to resentment among whites of the entire equal rights movement. In addition, if the rule were applied even-handedly, it could require the judicial approval in the future of programs that discriminate against minority workers, when the discriminatory programs are alleged to be "remedies" for past disparate treatment of white employees under affirmative action programs. The long term objective of racial equality will not be served by a program that spurs the advancement of minorities only by denying opportunities to whites.

I. The Racial Quota Imposed By Kaiser And USWA Is Illegal Under Title VII Because It Discriminates Against Non-Minority Employees.

The 50 per cent minority quota of Kaiser and USWA is an openly discriminatory system of selection of applicants for on-the-job training programs. The selection quota requires that minority employees be favored over more senior white employees solely on the basis of race. Under Title VII of the Civil Rights Act of 1964 and the authorities interpreting this statute, the reverse racial quota is illegal.

A. Race Discrimination Against Any Employee Is Prohibited Under Title VII, Whether or Not the Employee Is a Member of a Government-Recognized Minority Group.

Title VII of the Civil Rights Act of 1964 specifically prohibits discrimination in employment against *anyone* on the basis of race.[145] Section 703(a) of Title VII prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[146] Moreover, Section 703(d) prohibits discrimination on grounds of race in the selection of applicants for training programs. It states:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.[147]

Section 703 makes no exception for discrimination

145 42 U.S.C. §2000(e) *et seq.*
146 *Id.* §2000(e)-2(a).
147 *Id.* §2000(e)-2(d).

against white employees. In fact, the categorical prohibition of *any* racial discrimination establishes that Title VII prohibits discrimination against white workers as well as minority employees. Thus, the racial quota of Kaiser and USWA violates the provisions of Title VII.

Our reading of Title VII is consistent with the decisions of this Court. In *McDonald v. Santa Fe Trail Transportation Co.*,[148] the Court ruled that white persons may assert claims under Title VII and the same standards that are used in cases brought by minority employees are applicable to the claims of whites.[149] The Court stated:

> Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race." Its terms are not limited to discrimination against members of any particular race. . . .
>
> This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to "cover all white men and white women and all Americans," and create an "obligation not to discriminate against whites." We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon

148 427 U.S. 273, 96 S.Ct. 2574 (1976).
149 427 U.S. at 278-80, 96 S.Ct. at 2578-79.

> the same standards as would be applicable were they Negroes and Jackson white. (Citations omitted).[150]

The conclusion that whites are protected by Title VII is also supported by the decision of the Court in *Griggs v. Duke Power Co.*[151] In *Griggs*, the Court held that tests administered to determine selection for employment that have a disproportionate adverse impact on minority applicants must be job related. In reviewing the purpose and intent of Congress in adopting Title VII, the Court stated:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[152]

150 *Id.*
151 401 U.S. 424, 91 S.Ct. 849 (1971).
152 401 U.S. at 430-31, 91 S.Ct. at 853.

Thus, the Court's holding establishes that Title VII outlaws preferences in favor of minority as well as non-minority employees.

In the decision last term in *City of Los Angeles, Department of Water and Power v. Manhart*,[153] the Court in a sex discrimination case stated that Title VII was "designed to make race irrelevant in the employment market."[154] The Court held that the policy of the statute requires a focus on fairness to individuals, not fairness to classes.[155] In addition, the Court stated:

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . (Citation omitted).[156]

In another decision rendered last term, *Furnco Construction Corp. v. Waters*,[157] the Court reiterated this principle. It said: "It is clear beyond cavil that the obligation im-

153 435 U.S. 702, 98 S.Ct. 1370 (1978).
154 *Id.* at 709, 98 S.Ct. at 1376.
155 *Id.*
156 *Id.* at 708, 98 S.Ct. at 1375.
157 ___ U.S. ___, 98 S.Ct. 2943 (1978).

posed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."[158]

The decisions of this Court establish the illegality of the racial selection criterion used for the craft training programs. The application of the racial quota creates a preference in favor of a minority worker, to the detriment of a white, each time a selection is made of a minority worker without the highest seniority status. The 50 per cent quota creates two lines of seniority, one for the preferred minority workers and one for whites. For each person selected from the plant-wide seniority line for the training programs, a person must be selected from the seniority line of minority employees. Applying the "same standards as would be applicable"[159] if separate seniority lines favoring whites had been created, the racial quota is illegal under Title VII.[160]

Our interpretation of Title VII is also supported by the legislative history of the statute. This legislative history is reviewed exhaustively in the Brief of USWA and it is not necessary to present it in full in this brief. As USWA suggests, the legislative history demonstrates that the sponsors intended to prohibit

158 *Id.* at ____, 98 S.Ct. at 2951.

159 *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. at 280, 96 S.Ct. at 2579.

160 See, e.g., *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States*, 416 F.2d 980 (5th Cir. 1969).

any *requirement* of a preference to achieve a racial balance.[161] In addition, this history establishes that Congress intended to prohibit preferences in favor of any race.[162]

The intent of Congress concerning Title VII is demonstrated in the "Objections and Answers" submitted by Senator Joseph S. Clark, a floor manager of the bill. It states:

> Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> Answer: Quotas are themselves discriminatory.[163]

The statement that "[q]uotas are themselves discriminatory"[164] is supported by the observations of other sponsors of Title VII. In response to the claim that Title VII would allow the Commission to impose quotas, Senator Hubert S. Humphrey stated:

> [T]he very opposite is true. Title VII prohibits discrimination. In effect, it says that race,

161 42 U.S.C. §2000e-2(j); Brief of USWA at 25, 70-74.

162 *McDonald v. Santa Fe Trail Transport Co.*, 427 U.S. 273, 280, 96 S.Ct. 2574, 2578-79 (1976).

163 110 Cong. Rec. 7218 (1964).

164 *Id.*

> religion and national origin are not to be used as the basis for hiring and firing. . . .[165]

Senator Harrison A. Williams, Jr., another supporter of the bill, stated that "[t]hose opposed . . . should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy."[166] He added: "There is an absolute absence of discrimination for anyone; and there is an absolute prohibition against discrimination against anyone."[167]

If any doubt as to the "color blind" meaning of Title VII could have existed, it should have been erased by the explanation of the bill submitted by Senator Humphrey, which had been approved by the bipartisan floor managers of the bill in both houses of Congress.[168] It said:

> The title does not provide that any preferential treatment in employment shall be given to Negroes or any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment to any particular group, and any person, whether or not

165 *Id.* at 6549.

166 *Id.* at 8921.

167 *Id.*

168 *Id.* at 11846-48.

> a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. . . .[169]

Thus, no hidden meaning exists in the statute. The apparent intent to prohibit *any* race discrimination is supported by the legislative history.[170]

Contrary to the claims of Kaiser[171] and the Government,[172] the rejection of proposed amendments to Title VII in 1972 did not change the meaning or intent of the statute. Amendments proposed by Senator Sam Ervin to prohibit quotas and goals were rejected in the Senate, but this action does not suggest that the Senate wished to *approve* preferential quotas. Based on the language and legislative history of the statute, Congress had every reason to believe that racial quotas were already prohibited by Title VII. Although some courts in special circumstances may have approved numerical ratios in an effort to correct for past discrimination under Title VII,[173] this Court had announced in *Griggs v. Duke Power Co.* that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has

169 *Id.* at 11848.

170 The legislative history is also reviewed exhaustively in *Jersey Central Power & Light Co. v. Local 327, IBEW*, 508 F.2d 687 (3d Cir., 1975) and *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir., 1974). Both courts drew the same conclusions.

171 Brief of Kaiser at 34-35.

172 Brief of the Government at 31-35.

173 See Brief of the Government at 33.

proscribed."[174] Thus, a system of racial quotas to achieve numerical ratios was not believed to be authorized under the statute.[175] Moreover, the Senate may have believed the Ervin amendments could undermine the power of the courts to grant remedies to individuals victimized by race discrimination. Furthermore, the failure to take a proposed action in 1972 cannot provide a basis for interpretation of a bill passed in 1964.

In the House, Rep. John H. Dent proposed an anti-quota amendment to H.R. 1746, a bill designed to expand the enforcement powers of the EEOC. Neither the enforcement portion of the original H.R. 1746 nor the Dent amendment ever was put to a vote.[176] The debate on the amendment, however, establishes the understanding of the members of the House that quotas and preferences were already prohibited under Title VII.[177] The amendment offered by Rep. Dent was not intended to make any change in the substance of Title VII, but only to make emphatic the prohibition of

174 401 U.S. 424, 431, 91 S.Ct. 849, 853 (1971).

175 See the discussion of the United States Court of Appeals for the Fifth Circuit in *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States*, 416 F.2d 980, 995 (5th Cir., 1969): "[C]reating fictional employment time for newly-fired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is against such preferential treatment on the basis of race . . . ."

176 A substitute for the enforcement provisions of H. R. 1746 was offered by Rep. John N. Erlenborn and was eventually passed by the House.

177 See, e.g., 117 Cong. Rec. 31963.

preferences imposed by the government and quell the fears of some House members concerning the potential results of expanded EEOC enforcement authority.[178] Rep. Augustus F. Hawkins, who spoke in favor of the amendment, stated repeatedly that Title VII already prohibited the use of quotas.[179] He said:

> Again some say that this bill seeks to establish quotas and stop discrimination in reverse. Not only does title 7 prohibit this, but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. . . .[180]

In addition, Rep. Gerald R. Ford, who supported the substitute bill, indicated a belief that there was no necessity to amend the law to prohibit quotas. He said:

> The Philadelphia plan, which is what we are really talking about, does not have anything to do with quotas. I honestly think that the gentleman from Pennsylvania is drawing a false issue by the kind of language that he is employing in his proposed amendment. I just do not think that we ought to interfere with

178 117 Cong. Rec. 31964, 31965.

179 *Id.* at 31963, 31964.

180 *Id.* at 31963.

> this program with this kind of amendment. . . .[181]

Thus, the members of the House who spoke on the Dent amendment believed that it was unnecessary. This legislative history confirms our interpretation of the meaning of Title VII.

The amendments to Title VII proposed in 1972 to prohibit quotas were redundant and unnecessary. The failure of Congress to pass the amendments is no more enlightening on the meaning of the statute than any other failure of Congress to act. As this Court stated in *International Brotherhood of Teamsters v. United States*,[182] the only important Congressional views for purposes of statutory interpretation are those held in 1964. The Court said:

> [T]he section of Title VII that we construe here, §703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted §703(h) in 1964, unmistakable in this case, that controls.[183]

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181 *Id.* at 32091.

182 431 U.S. 324, 97 S.Ct. 1843 (1977).

183 *Id.* at 354 n. 39, 97 S.Ct. at 1864 n. 39.

Thus, the failure of Congress to pass the 1972 anti-quota measures does not mean that Title VII in 1964 was meant to permit quotas detrimental to whites.[184]

The reliance of Kaiser and the Government on the 1972 legislative history of the amendments to Title VII is an admission that the statute means what it says. If these parties could find any suggestion in the language of Title VII or the 1964 legislative history that quotas preferential to minority workers are valid, they would never have relied on a theory of intent divined from actions not taken in 1972. Therefore, Title VII prohibits an employer from granting a preference to minority workers in order to achieve a desired minority ratio in designated jobs.

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184 Even if the non-actions of Congress that are not taken after the passage of a bill could change the apparent meaning of the law, the 1972 non-actions of Congress are not the most recent instance of a Congressional failure to act. In 1978, Congress considered anti-quota provisions in connection with an appropriations bill. 124 Cong. Rec. H5371 (daily ed., June 13, 1978). See Brief of the American Civil Liberties Union and the Society of American Law Teachers Board of Governors Amici Curiae 90-95. Congress did not pass these amendments as they were deleted in a House-Senate conference. Report No. 95-1746, 95th Cong., 2d Sess., 25 (Oct. 6, 1978). However, both houses of Congress voted in favor of the anti-quota amendments. The House passed the amendment 232-177. 124 Cong. Rec. H5379 (daily ed., June 13, 1978). The Senate passed the amendment on a voice vote. 124 Cong. Rec. 16280. These recent votes of Congress in not taking any action are just as persuasive in demonstrating an anti-quota intent as the failure to act in 1972.

B. The Analogous Constitutional Decisions of the Court Establish that the 50 Per Cent Racial Quota Would Not Be Upheld if It Were Imposed By the Government.

This case arises under Title VII.[185] No claim for relief based on the constitution is presented.[186] Therefore, unlike the decision in *Regents of the University of California v. Bakke*,[187] the Court is not presented with parallel statutory and constitutional claims and it should be unnecessary to determine whether the reach of the statutory no-discrimination requirement equals or exceeds the constitutional prohibition of discrimination.[188] However, the race cases decided by this

185 The suit was also brought pursuant to 42 U.S.C. §1981. App., 13. However, reliance on 42 U.S.C. §1981 is unnecessary and the district court and court of appeal did not base their decisions on this statute.

186 A theoretical constitutional issue could arise if the Court determined that Congress in Title VII, or by its subsequent failure to enact amendments to Title VII, authorized the executive branch to require the imposition of racial preferences. However, this case does not involve a government-imposed quota, even though the regulations and requirements of the OFCC were a motivating force in the decision of Kaiser and USWA to institute the 50 per cent quota.

187 ___ U.S. ___, 98 S.Ct. 2733 (1978).

188 This case is also unlike *Bakke* in that the prohibition of race discrimination in Title VII applies to private parties, while in *Bakke* the statutory claim was made under Title VI, which is applicable to public institutions receiving federal assistance. 42 U.S.C. §2000d (1976). The prohibition of race discrimination of Title VI parallels the constitutional prohibitions of race discrimination by the federal or state governments, U.S. Const. Amend. V, XIV, while the Title VII prohibition of discrimination by private parties is less analogous to the constitutional requirement.

Court under the constitution and the decision in *Bakke* do provide analogous authority that the racial quota of Kaiser and USWA is illegal under Title VII.[189]

In *Bakke*, the Court invalidated a special medical school admissions program that reserved 16 per cent of the places in the entering class for members of minority groups. As white applicants were not permitted to compete for the seats reserved for minority applicants, the special admissions program was ruled illegal.[190] This decision provides support for the holding of the court of appeals because half of the openings in the craft training programs at the Gramercy plant were reserved for minority workers. White bidders with the requisite seniority had no opportunity to obtain entry into these positions.

The racial quota of Kaiser and USWA is more invidious than the 16 per cent quota in *Bakke* because it robs non-minority workers of seniority rights accrued by years of service to Kaiser and USWA. No loss of an accrued right of white applicants was present in *Bakke*. Moreover, the First Amendment interest in furthering academic freedom by attaining a diverse student body, which tended to support the consideration of race in

189 See *General Electric Co. v. Gilbert*, 429 U.S. 125, 133, 97 S.Ct. 401, 407 (1976), where the Court held that decisions rendered pursuant to the Fourteenth Amendment provided a "useful starting point" for Title VII analysis.

190 ___ U.S. at ___, 98 S.Ct. at 2764. (Powell, J., announcing the judgment of the Court.)

Bakke,[191] is not present in this case. Furthermore, in *Bakke* the admissions program as a whole was not based solely on objective criteria.[192] The consideration of many subjective factors may have made the consideration of race less objectionable. In this case, on the other hand, the seniority criterion is not subjective: it provides benefits based on time in service to the employer, applies equally in the absence of discrimination in the provision of seniority rights, and is valid under Title VII.[193] Thus, the discriminatory program of Kaiser and USWA is more objectionable than the admissions program in *Bakke*.

The 50 per cent quota would also be invalid under the equal protection standard ordinarily implemented in race cases by this Court. Race is a suspect classification[194] and race discrimination is subjected to the closest judicial scrutiny.[195] Under the strict scrutiny analysis, a classification imposed by the Government must serve a compelling or necessary governmental interest and must be carefully tailored to

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191 *Id.* at ____, 98 S.Ct. at 2760-64 (Powell, J.).

192 See, e.g., *Id.* at ____, 98 S.Ct. at 2740 (Powell, J.); 98 S.Ct. at 2807 (Blackmun, J., dissenting).

193 42 U.S.C. §2000e-2(h) (1976).

194 *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193 (1944).

195 *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823 (1967).

achieve this goal.[196] The justifications offered for the 50 per cent quota in this case could not meet this standard.

Although Kaiser and the Government fear to admit it,[197] the primary purpose for the racial quota was to achieve the same minority ratio in craft jobs at the Gramercy plant as the percentage of minority workers in the local labor force. The one-for-one selection criterion was imposed "to achieve a desired minority ratio."[198] The "desired minority ratio" in this case was the 39 per cent minority ratio in the local labor force.[199] Once this goal is reached, Kaiser "will then revert to a ratio of what that percentage is"[200] in order to maintain the "desired minority ratio" in the crafts indefinitely.

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196 Compare *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S.Ct. 1322, 1333 (1969) ("compelling interest" test) with *Regents of the University of California v. Bakke*, ____ U.S. ____, ____, 98 S.Ct. 2733, 2756-57 (1978) (Powell, J.). See the dissenting opinion of Brennan, J., with whom Marshall, J., joined, in *Kahn v. Shevin*, 416 U.S. 351, 357-58, 94 S.Ct. 1734, 1738 (1974):

> "[S]uspect classifications can be sustained only when the state bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means.

197 USWA, at least, admits that the motivation for implementing the racial quota was not past discrimination. The racial quota was designed to increase the ratio of minority workers in craft jobs.

198 This is the reason for the implementation of the racial quota stated in the 1974 Labor Agreement between Kaiser and USWA. App., 137.

199 App., 60.

200 App., 69.

However, the goal of achieving a desired ratio of any race in designated jobs would not be constitutionally permissible. As the opinion of Mr. Justice Powell stated in *Bakke:*

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.[201]

In their attempts to circumvent the real purpose of the 50 per cent quota, Kaiser and the Government characterize it as a purported "remedy" for past discrimination.[202] These parties assert that, had Kaiser undertaken an analysis of whether a prima facie statistical case for a Title VII claim could have been made out by a minority plaintiff for the Gramercy plant, Kaiser "[c]ould [r]easonably [b]elieve"[203] that a prima facie case existed. Of course, no such analysis

201 *Regents of the University of California v. Bakke,* ___ U.S. ___, ___, 98 S.Ct. 2733, 2757 (1978) (Powell, J.).

202 E.g., Brief of Kaiser at 46-49; Brief of the Government at 42-54.

203 Brief of the Government at 42.

was made.[204] In any event, even if the goal of correcting past discrimination were the reason for the racial quota,[205] the means employed to achieve the goal in this case are virtually unrelated to the goal.

A true "remedy" granted to an individual must be designed to correct past discrimination against the individual: "it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights. . . ."[206] In this case, however, none of the parties preferred under the racial quota were subjected to past discrimination by Kaiser.[207] As the Government concedes, "[i]t is true, of course, that the blacks selected for the training program had not been identified as victims of prior discrimination at the Gramercy plant."[208] Thus, the class-based preference of Kaiser and USWA was not only imprecisely tailored, it was largely unrelated to the pur-

204 As USWA states in its brief, "[t]he program was negotiated without regard to specific conditions at any one plant, and certainly was not based on an assessment of the particulars of the situation at the Gramercy plant." Brief of USWA at 5.

205 We do not question that this goal would be an important or compelling goal if the remedy were for discrimination against identified individuals.

206 *Regents of the University of California v. Bakke,* ___ U.S. ___, ___, 98 S.Ct. 2733, 2753 (1978) (Powell, J.)

207 The district court found that "none of its black employees who were offered on-the-job training opportunities over more senior white employees . . . had been the subject of any prior employment discrimination by Kaiser." 415 F.Supp. at 764.

208 Brief of the Government at 52.

ported goal of remedying any actual past discrimination.[209]

Kaiser and the Government recognize that the racial quota is not designed as a remedy for discrimination against individuals. Therefore, they argue that it would be too difficult to enact individual remedies.[210] This argument in essence is based on administrative convenience; the "zone of reasonableness"[211] standard would make it administratively easier to correct for assumed past disparities. Administrative convenience, however, cannot justify a policy that discriminates on the basis of race.[212] If Kaiser and USWA wish to provide remedies to victims of past discrimination by

209 The sole basis for the purported remedial purpose is an assumption or stereotype about individuals because of their membership in particular racial groups. These assumptions in general may have validity. However, assumptions about the preferred individuals could not justify overt discrimination against others. In addition, preferences based on assumptions necessarily could not be tailored to correct only for the actual amount of past discrimination.

210 Brief of the Government at 38-39. Brief of Kaiser at 30-31, 44 *et seq.*

211 Brief of Kaiser at 45.

212 See the dissenting opinions of the justices who viewed sex as a suspect classification in *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734 (1974). Mr. Justice Brennan, who was joined by Mr. Justice Marshall, believed that a statute providing a property tax exemption to widows was not tailored carefully enough to satisfy the appropriate judicial scrutiny. "The statute nevertheless fails to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means." 416 U.S. at 360, 94 S.Ct. at 1740. Mr. Justice White also found that the statute was inappropriately tailored. He said:

> I perceive no purpose served by the exemption other than to alleviate current economic necessity, but the State extends the exemption to widows who do not need the help and denies it to widowers who do. It may be administratively inconvenient to make individual determinations of entitlement and to extend the exemption to needy men as well as needy women, but administrative efficiency is not an adequate justification for discriminations based purely on sex. (Citations omitted).
>
> 416 U.S. at 361, 94 S.Ct. at 1740.

granting preferences that are harmful to whites, the remedies must be properly tailored to achieve the end without unnecessary damage to the rights of innocent employees.

The 50 per cent racial quota would not be valid under the analagous constitutional decisions of this Court. Therefore, it should be invalidated under Title VII.

II. The Purported Justifications Offered By Kaiser, USWA And The Government For The 50 Per Cent Quota Are Insufficient To Validate The Policy Of Open Discrimination Against White Workers.

The 50 per cent quota of Kaiser and USWA is a discriminatory policy that disadvantages a white employee for each minority worker who is preferred. This policy violates Title VII. The asserted justifications for the racial quota are not sufficient to justify a discriminatory racial practice. Therefore, the 50 per cent quota should be held invalid.

A. The 50 Per Cent Quota Was Not a Remedial Measure and Could Not Be Upheld in Any Event Because It Was Not Restricted to Individual Victims of Past Discrimination.

The Government in effect concedes that the 50 per cent quota is invalid to the extent that it serves the actual purpose for which it was implemented, the achievement of a desired ratio of minority workers in craft jobs. Unlike USWA,[213] the Government attempts to avoid the issue in this case by characterizing the facts as if Kaiser had "identified" past discrimination at the Gramercy plant.[214] The Government apparently feels free to ignore the record and engage in gratuitous speculation and self-serving, after-the-fact rationalizations concerning the racial quota because of the alleged "limited"[215] inquiry at the trial. Kaiser does not fully resort to this approach, but does assert that "identified discrimination" by society, causing a "clearly defined deprivation," was a motivation for the 50 per cent quota.[216]

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213 USWA does face up to the issue, but its strained interpretation of the legislative history of Title VII does not validate discriminatory racial preferences. See discussion in Part II(B) *infra*.

214 Brief of the Government at 42 *et seq.*

215 Brief of the Government at 43. The Government also states: "[T]he record does not establish in detail the factual basis for Kaiser's concerns."

216 Brief of Kaiser at 46, 47.

Contrary to the overt or implied assertions of these parties,[217] the record does establish the reasons for the adoption of the racial quota and they do not include an intent to remedy any specific past discrimination. Moreover, notwithstanding the purported "evidence" offered in this Court from outside the record by the Government, past employment discrimination had not occurred at the Gramercy plant and a prima facie statistical case could not have been made out concerning the craft positions. Furthermore, as all the parties concede, the individuals preferred under the 50 per cent quota were not subjected to past discrimination by Kaiser. A racial preference would be valid only to the extent that it corrected on an individual basis for past race discrimination. Therefore, the contentions of Kaiser and the Government should be rejected.

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217 *Id.* We have already reviewed, in our Brief for Respondents in Opposition to the Petitions for Writs of Certiorari, the interest in this case shown by the EEOC and our efforts to keep the EEOC informed of events occurring prior to, at, and after the trial. Brief of Respondents in Opposition to the Petitions for Writs of Certiorari at 5-6. The EEOC contacted counsel for each party and appears to have apprised itself of the potential role it could play in achieving a not "limited" record. The EEOC declined to appear at the trial and instead apparently chose to adopt its current role on appeal of speculating as to what the proof might have been.

In addition to our efforts to keep the EEOC informed of developments at the trial level, the district court required the posting of the class notices in this case, containing a description of the litigation, on all employee bulletin boards at the Gramercy plant and at the union hall of USWA. App., 24-25. It is unlikely that any minority employees were unaware of this case or its potential effect on them, yet none intervened to offer any evidence.

1. The reasons for the racial quota are fully established in the record.

A complete inquiry into the reasons for the establishment of the racial quota was conducted at the trial. Kaiser presented its director of equal opportunity affairs for the entire Kaiser corporation,[218] Thomas M. Bowdle. Mr. Bowdle indicated that the reasons for the adoption of the racial quota were the low percentage of minority workers in the crafts,[219] suggestions made by officials of the OFCC as to this low utilization,[220] and a desire to make up for assumed past discrimination against minorities by society at large.[221] Mr. Bowdle knew of "no specific evidence of discrimination at the Gramercy plant."[222] The racial quota was not implemented to correct for past discrimination by Kaiser.[223] Mr. Bowdle stated:

> Q. Mr. Bouble (sic), you have referred, during the course of your testimony, to the present effects of past discrimination. Do I understand you to indicate that these employees that are now being favored were discriminated against by Kaiser?
>
> A. No.[224]

218 App., 89.
219 App., 90-91.
220 App., 93.
221 App., 90, 94, 108.
222 App., 108.
223 App., 99.
224 App., 99.

The statements of Mr. Bowdle are direct, on-the-record denials of an intent of Kaiser to correct for any past discrimination by the company through the 50 per cent quota. These statements of the person most likely to have knowledge of the motivations of Kaiser should be more persuasive than after-the-fact rationalizations presented by the Government.[225]

The statements of Mr. Bowdle were supported by the testimony of Dennis E. English, the industrial relations superintendent at the Gramercy plant. He stated: "We do not think that we have discriminated inside our plant."[226] In addition, the motivation of USWA for adopting the racial quota is stated in its brief. It says:

> [The provision establishing the one-for-one quota was] the core of the national program established by Kaiser and USWA to increase the proportion of minorities in skilled craft positions at all of the Kaiser plants. The program was negotiated without regard to specific conditions at any one plant, and certainly was not based on an assessment of the

225 The Government asserts that "Kaiser and the Steelworkers were in the awkward position of seeking to defend their training programs without admitting liability for previous discrimination against blacks . . . ." Brief of the Government at 43. However, USWA did try to show past discrimination by Kaiser. Moreover, it is one thing to suggest that Kaiser and USWA had no incentive to admit past discrimination, and quite another to advance a theory that carries the implied assertion that Mr. Bowdle's specific denials of any motivation to cure past discrimination by Kaiser were misrepresentations.

226 App., 81.

particulars of the situation at the Gramercy plant.[227]

Furthermore, the 1974 Labor Agreement specifically states the reason for the 50 per cent quota. It says that the purpose of the "goals and time tables" is "to achieve a desired minority ratio."[228] Thus, the racial quota was implemented to accomplish the statistical objective of a minority ratio equal to the percentage of minority workers in the local labor force. It was not motivated by speculation concerning the possibility of past discrimination by Kaiser.

2. Persuasive evidence of past discrimination by Kaiser could not have been presented at the trial because it does not exist.

The Government in effect concedes that the racial quota is invalid under the factual determinations of no discrimination of the district court and court of appeals. Rather than facing the issue presented here, the Government relies on an elaborate and inaccurate scenario in which Kaiser is represented as fearful of being found liable for Title VII violations at the Gramercy plant.[229] While not fully adopting this posture, Kaiser

227 Brief of USWA at 5.

228 App., 137.

229 Brief of the Government at 42 *et seq.* This position is also a virtual concession of the invalidity of the regulations of the OFCC as approved by the EEOC, which require preferences for minority workers whenever "underutilization" is found to exist, regardless of the reasons for the statistical disparity in the employment of

suggests that the existence of "identified discrimination" was established.[230] The obvious belief of these parties that a racial preference is valid only to correct for identified past discrimination is a concession that the legal holding of the court of appeals is correct.[231] In this case, moreover, there was no identified past discrimination at the Gramercy plant. Thus, the decision of the court of appeals should be upheld.

Although the percentage of minority craftsmen at the Gramercy plant was far lower than the ratio of minority workers in the local labor force, it was not lower than the percentage of minority craftsmen with the requisite skills in the work force. The evidence established that the percentage of minority craftsmen at the Gramercy plant was small "because of the unavailability of trained, educated and qualified minorities."[232] The percentage of available minority

minority workers. The EEOC publicly proclaims through its regulations that in order to grant "affirmative action" preferences through the achievement of goals and timetables, "[i]t is not necessary that a self-analysis establish a violation of Title VII." 29 C.F.R. §1608.4(b). In light of this public posture, it is hard to understand the necessity to imagine a scenario assertedly presenting a basis for a belief by Kaiser in the existence of past discrimination at the Gramercy plant.

230 Brief of Kaiser at 46 *et seq.*

231 The Government makes a token argument that the racial quota is authorized under Executive Order 11246, Brief of the Government at 54 *et seq.*, but retrieves the profferred issue by stating that there is "no need in this case to consider whether or to what extent, Title VII permits the Executive Order to authorize or require government contractors to undertake affirmative action measures that would be impermissible if undertaken by other employers. For the reasons we have shown, the Gramercy training programs were proper under Title VII wholly apart from the fact that Kaiser is a government contractor." *Id.* at 55.

232 App., 62.

craftsmen in the local labor force was no greater than the percentage of minority craftsmen employed by Kaiser.[233] Kaiser was unable to locate and hire minority craftsmen despite affirmative action efforts, including the establishment of goals and timetables, advertising in New Orleans and Baton Rouge newspapers, advertising in minority newspapers, maintenance of a minority craft file, and a policy to "always look for the blacks before the whites."[234] A significant number of minority craftsmen were not found "because they aren't available."[235] As the court of appeals stated, the low ratio of minority craftsmen at the Gramercy plant "reflects the general lack of skills among available blacks but does not reflect any unlawful practice by Kaiser."[236]

In an effort to suggest that this evidence is "subject to question,"[237] the Government asks the Court to take judicial notice of census statistics purportedly showing a disparity between the ratio of black craftsmen at the Gramercy plant and available black craftsmen in the work force.[238] In fact, Kaiser never considered any such alleged disparity in instituting the 50 per cent quota. Nevertheless, we welcome the discussion of the census

233 App., 76.

234 App., 62-63.

235 App., 63.

236 563 F.2d at 224 n. 13.

237 Brief of the Government at 44.

238 Brief of the Government at 44-46. These statistics are also relied on by a number of parties appearing as *amici curiae*.

statistics[239] because the Government in relying on them apparently admits that the disparity between the ratio of black craftsmen at the Gramercy plant and the percentage of minority workers in the general labor force would not prove a prima facie case in a Title VII suit involving the crafts.

In support of its claim that a statistical disparity existed between the ratio of minority craftsmen at Kaiser and the minority craftsmen in the local labor force, the Government relies on census statistics for "craftsmen and kindred workers" for the State of Louisiana.[240] These statistics show that 15.7 per cent of the "craftsmen and kindred workers" were black.[241] The Government is unable to provide any data by specific craft category for the Gramercy area, but assumes that the general data for craft and kindred workers for the entire state is illustrative of the availability of skilled craftsmen of the type required by Kaiser in the Gramercy area.[242]

The census data relied on by the Government could not be probative. As the Government admits but fails to discuss, its data does not reflect the statistics for

239 We have no objection to the Court taking judicial notice of any reliable evidence. We assume that the Court will not refuse to consider the census statistics. However, as we shall point out, these statistics could have virtually no probative value toward buttressing the argument of the Government.

240 Brief of the Government at 45.

241 *Id.*

242 *Id.*

skilled heavy industrial craftsmen, but instead reflects a general lumping together of craft *and kindred* workers. The general data for craft and kindred workers reported on the census includes such varied jobs as upholsterers, bakers, telephone linemen, locomotive engineers and printers.[243] In addition, while census data may be useful in cases where the statistics reflect specific jobs, it would be impossible in this case to break out the craftsmen from the kindred workers.[244] Indeed, the questions asked in the census would not provide a basis for distinguishing skilled craftsmen from apprentices, helpers or other persons working in areas kindred to craft jobs.[245] Moreover, as the Government concedes, the census does not break down the general categories of craft and kindred workers for the Gramercy area.[246] Thus, the Government is not even able to provide specific categories for the Gramercy area of its lumped-together data for craft and kin-

243 U.S. Bureau of the Census, Census of Population, Vol. 1: Characteristics of the Population, Part 20, Louisiana, Table 172.

244 The data is compiled from questions that permit only a general lumping of craft and kindred workers. The questions are: (a) "What kind of work was he doing?" (Examples of answers: "TV repairman, sewing machine operator, spray painter, civil engineer, farm operator, farm hand, junior high English teacher"); (b) "What were his most important activities or duties?" (Examples of answers: "Types, keeps account books, files, sells cars, operates printing press, cleans buildings, finishes concrete"; (c) "What was his job title?" U.S. Bureau of the Census, 1970 Census of Population; Vol. 1: Characteristics of the Population, Part 20, Louisiana, Appendix B, App. — 40.

245 See n. 244 *supra*.

246 Brief of the Government at 45 n. 21.

dred workers. The purported prima facie case that Kaiser could have worried about, had it realized the need to do so, would have been based on extrapolations from statewide data for "craft and kindred" workers.

In addition to being useless on its face to support a prima facie showing of past discrimination, the census data of the Government does not fare well when compared with other statistics. For instance, in addition to its report on the census, the Government in another part of its brief provides more detailed and far different information regarding the availability of skilled craftsmen. It states:

> In 1969, 58 percent of the nation's local craft unions reported to the Equal Employment Opportunity Commission that they had no black members; nationwide, the electricians unions were 1.9 percent black; the ironworkers were 1.7 percent black; the plumbers 0.8 percent black; and the sheet metal workers 0.7 percent black.[247]

To believe both the census data and the EEOC data offered by the Government, the Court would have to conclude that the availability of skilled craftsmen in Louisiana is about 1,200 per cent of the national

247 *Id.* at 59.

average.[248] A basis for this conclusion has not been established.

The disparity between census data and a more detailed analysis relating to the crafts is exemplified by the litigation relating to the Philadelphia plan. In *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,[249] the district court stated that the Department of Labor found the minority representation in 1969 in six specified crafts to be "approximately one (1) percent" although "the overall minority groups representation in the construction industry in the five-county Philadelphia area was thirty (30) percent . . . ."[250] We doubt that the Government would question these figures. Nevertheless, the 1970 census reported the minority ratio of craftsmen and kindred workers for the Philadelphia area to be 11.2 per cent.[251] If the relationship of actual to census figures for Philadelphia holds true for Louisiana, the availability of skilled craftsmen in Louisiana would be 1.4 per cent.[252]

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248 The average of the reported percentages at pages 50-51 of the Brief of the Government is 1.275. The asserted availability of craftsmen in Louisiana is 15.7 per cent. Brief of the Government at 45.

249 311 F.Supp. 1002 (E.D. Pa., 1970).

250 *Id.* at 1005.

251 U.S. Bureau of the Census, 1970 Census of Population, Vol. 1: Characteristics of the Population, Part 40, Philadelphia, Pa. — N.J., SMSA, Table 172.

252 $\frac{1\%}{11.2\%} = \frac{1.4\%}{15.7\%}$.

The inflated nature of the census figures would not be surprising even if the data were collected in a reliable manner. As the United States Commission on Civil Rights reported in 1976, minority representation in the crafts is exaggerated even on EEO forms. It said:

> The EEO-3 statistics include along with journeymen doing skilled construction work, several other categories of union members who perform less-skilled or nonconstruction work . . . . These other categories are: (1) apprentices; (2) union members — sometimes journeymen — who do not work in the construction industry; (3) other workers, with titles such as helpers and tenders, who are neither apprentices nor journeymen.[253]

Thus, the data offered by the Government is not reliable.

Even if the Court were to rely on the census statistics, a close examination of this data tends to confirm the evidence in the record. The census report breaks out the general data for only a few of the craft categories employed by Kaiser. In addition, the census data does not distinguish heavy industrial skills from those employed generally by craftsmen.[254]

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253 The Challenge Ahead, Equal Opportunity in Referral Unions (U.S. Comm'n. on Civ. Rts., May, 1976) at 40.

254 E.g., a skilled "general repairman" in heavy industry would be far different from the average general repairman reported on the census. A general repairman at Kaiser would install, repair, assemble and replace virtually all types of heavy industrial equipment.

Nevertheless, in some of these categories the minority representation is very low, even for craft and kindred workers. For instance, the census indicates that only three per cent of the craft and kindred electricians were black.[255] At least two craft categories at Kaiser required electrical skills.[256] The census reported that less than 4.5 per cent of those involved in "air conditioning, heating and refrigeration" work were black.[257] One of the craft categories at Kaiser was air conditioner repairman.[258] Most of the other census categories are generalized. While the Government represents the census as reporting that "blacks comprised . . . 10.4 percent of the State's machinists,"[259] this census category actually includes "[m]achinists and job and dye setters."[260] In one craft of Kaiser that is fairly representative of a general craft category, carpenter-painter, Kaiser employed 16 per cent minority craftsmen at the Gramercy plant.[261]

If Kaiser had ever thought to extrapolate a statistical argument from census data to support an imaginary Title VII claim against itself, it would not have feared that the analysis of the Government could constitute a

255 U.S. Bureau of the Census, 1970 Census of Population, Vol. 1: Characteristics of the Population, Part 20, Louisiana, Table 172.

256 These were electrician and instrument and electrical repairman. App., 167.

257 Census Characteristics, *supra* n. 254, Louisiana, Table 172.

258 App., 167.

259 Brief of the Government at 45 n. 21.

260 Census Characteristics, *supra* n. 254, Louisiana, Table 172.

261 App., 167.

prima facie case. In any event, the census statistics are not the basis for the 50 per cent quota. Minority craftsmen with the requisite skills were unavailable in the Gramercy area. The most persuasive evidence of this fact is the institution of the training programs. As Mr. Bowdle stated:

> Q. Now, sir, on a pure economic basis, what would be the cheapest procedure, on a pure cost approach, for obtaining qualified craft employees at the various Kaiser plants?
>
> A. Hire them off the street. If we had adequate supply of craftsmen, candidates coming off the street, that would be the logical way for us to fill our craft jobs, rather than train, because training costs money.[262]

The only other purported evidence of past discrimination offered by the Government is the requirement of Kaiser that craftsmen have prior industrial experience.[263] This requirement may have been illegal, the Government speculates, because prior experience may not have been necessary to perform the craft jobs.[264] However, the Government fails to recognize that prior experience is the essential requirement of being a craftsman.[265] The National Appren-

262 App., 95.

263 Brief of the Government at 46-48.

264 *Id.* at 48 n. 23.

265 See The National Apprenticeship Program (U.S. Dept. of Labor, Employment and Training Admin., Rev. 1976).

ticeship Program of the Department of Labor recognizes that craft occupations are "learned through experience and training on the job, supplemented by related technical instruction."[266] The prior experience requirement on its face was job related and the district court implicitly found this requirement to be a business necessity.[267] The position of the Government can be likened to questioning the requirements that lawyers have a law degree and pass the bar exam or that doctors have a medical degree.[268] Even Judge Wisdom, in asserting that "the requirement of any training for some craft jobs may be illegal," recognized that "this claim would be the most easily refuted by an employer . . . ."[269] Moreover, this assertion of the Government is ironic in this case, where the Government seeks to obtain entry for minority workers on a disproportionate basis into training programs designed to provide the requisite experience. If no experience is necessary, minority workers do not need to enter training programs under a discriminatory quota. Furthermore, the evidence establishes that the prior experience requirement was not the reason for the adoption of the racial quota. Thus, this requirement did not provide the

266 *Id.* at 10.

267 This finding is implicit in the factual finding of no past discrimination. 415 F.Supp. at 764. As Judge Wisdom stated: "The judge simply accepted the statement that prior experience was a business necessity . . . ." 563 F.2d at 232.

268 Relatively fewer minority group members than non-minority members possess these qualifications.

269 563 F.2d at 232.

basis for any asserted reasonable belief in potential Title VII liability.[270]

The Government also makes a token argument that a prima facie case could be based on the disparity between the minority representation in the unskilled work force at the Gramercy plant and the minority ratio in the local labor force.[271] This argument, however, is meritless in light of the consideration of these statistics by the district court and the finding that Kaiser had not discriminated in the past.[272] In addition, although the Government suggests that the "best qualified" hiring policy employed prior to 1969 was potentially illegal under Title VII because of the cited statistical disparity, this disparity arose in large part prior to the passage of Title VII. The Gramercy plant opened in 1957 or 1958;[273] the initial hiring by the company occurred at that time. In light of the 50-50 hiring ratio implemented at the gate since 1969, it is unlikely that any important disparity exists between the minority representation in the work force and the

270 The evidence indicated that, sometime prior to the institution of the 1974 training programs, Kaiser lowered the prior experience requirement for entry into craft jobs from five years to three years. App., 70. The difference in the five year and three year requirements apparently did not change the impact of the prior experience requirement on blacks because Kaiser was still unable to hire trained craftsmen from outside the plant. Only one black craftsman was hired from off the street in the years 1972-74. App., 167.

271 Brief of the Government at 43.

272 415 F.Supp. at 764.

273 App., 71.

minority hiring by Kaiser since the effective date of Title VII.[274] Thus, any statistical case of past discrimination would be weak or nonexistent. The finding of no discrimination by the district court is correct.

3. The 50 per cent quota is not legal as a remedy because none of the persons preferred under the quota were victims of past discrimination by Kaiser.

Although the Government insists on imagining the asserted prima facie cases that Kaiser might have feared had it thought to do so, the Government does not claim that the 50 per cent quota could have been designed to provide individual remedies to minority

274 See *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736 (1977), where the Court held that the important statistical evidence relates to hiring practices after the effective date of Title VII. The Court said:

> The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes. For this reason, the Court cautioned in the *Teamsters* opinion that once a prima facie case has been established by statistical work force disparities, the employer must be given an opportunity to show "that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination." (Citation omitted).

Id. at 309-10, 97 S.Ct. at 2742-43.

workers for past discrimination. The Government concedes that "the blacks selected for the training program had not been identified as victims of prior discrimination at the Gramercy plant."[275] This admission is consistent with the findings of the district court and court of appeals that "none of [the] black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser."[276]

Whatever might be shown by the statistics relating to the Gramercy plant, the minority workers preferred under the 50 per cent quota *were hired* by Kaiser. They were accorded all the benefits granted to unskilled white workers. Their seniority status in bidding for training opportunities was based on the date of hire.[277] The seniority system at Kaiser did not discriminate on the basis of race.[278] Thus, these employees had not been victimized by past employment discrimination by Kaiser.[279]

275 Brief of the Government at 52.

276 415 F.Supp. at 764; 563 F.2d at 224. This point does not appear to have been questioned in the dissent of Judge Wisdom. See 563 F.2d at 235-36.

277 App., 72.

278 App., 72.

279 The Government asserts in a footnote that these employees were "potential" victims of discrimination because they had no prior craft experience and could not apply for craft jobs. This argument assumes that no experience requirement for craft jobs was necessary. Unskilled laborers, under the theory of the Government, should have been placed directly into dangerous and complex jobs involving high electrical voltage, complex machinery and

The decisions of this Court establish that "remedial" preferences are valid only to the extent that they correct for past illegal discrimination.[280] In addition, even these remedies must be adjusted so as not to unduly upset "the legitimate expectations of other employees innocent of any wrongdoing."[281] In *International Brotherhood of Teamsters v. United States*,[282] the Court held that Title VII remedies should be accorded only to individuals who had been victims of past discrimination; the Government's theory that a remedy is sufficient if it has "a fair degree of specificity" was rejected.[283] The Court held:

> While it may be true that many of the non-applicant employees desired and would have applied for linedriver jobs but for their knowledge of the company's policy of discrimination, the Government must carry its burden of proof, with respect to each specific individual, at the remedial hearings to be conducted by the District Court on remand.[284]

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instrumentation, industrial chemicals and sophisticated tolerances and calibrations. In addition, the "potential" victim theory ignores the fact that the white workers at the plant who were disadvantaged by the racial quota were also prevented from applying for craft jobs by the prior experience requirement. The "potential" victim theory is a far cry from the test adopted by the Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 362 *et seq.*, 97 S.Ct. 1843, 1868 *et seq.* (1977).

280 *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843 (1977).

281 *Id.* at 372, 97 S.Ct. at 1873.

282 431 U.S. 324, 97 S.Ct. 1843 (1977).

283 *Id.* at 368, 97 S.Ct. at 1871.

284 *Id.* at 371, 97 S.Ct. at 1873.

The Court specifically required that, to fashion a remedy, the district court identify the "actual victims of the company's discriminatory practices."[285] The equitable power of the district court apparently was held to encompass returning identified victims of discrimination to their "rightful place,"[286] but only after a balancing of the remedy with the legitimate interests of innocent employees.[287]

The holding in the *International Brotherhood of Teamsters* case is supported by the decision of the Court in *Franks v. Bowman Transportation Co.*[288] In *Franks* the Court held that seniority relief could be provided to "identifiable victims of racial discrimination. . . ."[289] The applicable principle in fashioning a remedy is to require that " 'persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.' "[290] The Court did not approve class "remedies" based on race[291]

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285 *Id.* at 371-72, 97 S.Ct. at 1873.

286 *Id.* at 372, 97 S.Ct. at 1873.

287 *Id.*

288 424 U.S. 747, 96 S.Ct. 1251 (1976).

289 *Id.* at 774, 96 S.Ct. at 1269.

290 *Id.* at 764, 96 S.Ct. at 1264.

291 See also the statement of Mr. Justice Powell in *Regents of the University of California v. Bakke*, ___ U.S. ___, ___, 98 S.Ct. 2733, 2755 (1978); "But we have never approved preferential classifications in the absence of proven constitutional or statutory violations."

The decisions limiting remedies to individual victims of past discrimination are sound. The purpose of the prohibition against race discrimination is to protect individuals from the effects of stereotyped attitudes and prejudices about racial groups. Indeed, the purpose of Title VII was to "give people the opportunity to be hired on the basis of merit. . . ."[292] In addition, a preference favorable to a class may have a tenuous relationship to assumed past discrimination, but this factor is outweighed by the known and overt discrimination against those disadvantaged by the preference. Furthermore, in the absence of past discrimination against an individual, a racial preference in favor of that individual is itself a violation of Title VII. Therefore, the racial quota is invalid because it does not remedy any prior discrimination against the preferred minority employees.

Because the racial quota is not limited to individual victims of past discrimination, it is not an "[a]ppropriate"[293] or "[r]easonable"[294] remedy for "the [p]roblem"[295] as claimed by Kaiser and the Government. A class-wide program of preferences does not necessarily remedy any past discrimination against individuals. The administrative inconvenience of identifying individual victims of discrimination does not

292 110 Cong. Rec. at 6549.

293 Brief of the Government at 48.

294 Brief of Kaiser at 51.

295 *Id.*

justify broad racial preferences that disadvantage innocent employees.[296] Class preferences do not insulate employers from Title VII actions brought by actual victims of past discrimination. These parties may sue even if "remedial" preferences have been granted to others of their race. Thus, the racial quota is not reasonable.

Nor is the racial selection criterion valid because, under the training programs, whites "gained an opportunity to qualify as craft workers."[297] Regardless of the new opportunities provided under the training programs, unequal treatment in these programs is expressly prohibited by Section 703(d) of Title VII.[298] Discrimination against minority workers in training programs would not be valid simply because some of them got new opportunities. Therefore, discrimination against whites should not be permitted on this ground.

No past discrimination existed at the Gramercy plant. The 50 per cent quota is not remedial. The discrimination against white workers is not justified. Therefore, the racial quota is invalid.

296 In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371, 97 S.Ct., 1843, 1873 (1977), the Court required the identification of individual victims as a prerequisite to the issuance of remedies, although it noted that "[t]he task . . . will not be a simple one."

297 Brief of Kaiser at 58.

298 42 U.S.C. §2000e-2(d) (1976).

B. *The Legislative History of Title VII Does Not Support the Inference of USWA that Racial Preferences for Minorities Are Allowed, Though Not Required, Under the Statute.*

USWA recognizes that the 50 per cent quota was not instituted to correct for past discrimination, but instead was intended to achieve a desired minority ratio in the crafts. The union faces up to the issue in this case: whether a racial preference for minority workers may voluntarily be instituted by private parties. However, the legislative argument offered by USWA in support of the theory that voluntary preferences for minorities may be implemented has no merit. This theory is inconsistent with the express language of the statute, contrary to the decisions of this Court, and incompatible with the legislative history.

The theory that quotas in favor of minority workers are permissible is based solely on inference. USWA finds numerous passages in the legislative history stating that employers may not be required to institute racial preferences to eliminate a racial imbalance.[299] It infers, then, that racial preferences are permitted: "The natural inference is that an employer or union is *permitted* to do so."[300] However, there is no basis for this inference.

Title VII makes it an unlawful employment practice to discriminate against *any individual* on the basis of race. Section 703(a)(1) of Title VII states that it shall be unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . ."[301] Section 703(d) makes it unlawful "to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training."[302] A preference to minority workers embodies discrimination against non-minority employees. This discrimination is expressly prohibited by the language of the statute, which controls over negative inferences drawn from the legislative history by USWA.

The inference of USWA is also invalid in light of the holdings of this Court. In *Griggs v. Duke Power Co.*,[303] the Court made it clear that an inference may not be drawn from the statute that preferences for minority groups are permissible. It stated: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[304] In *McDonald v. Sante Fe Trail Transportation Co.*,[305] the Court held that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and [the allegedly preferred employee] white."[306] As Title VII

299 Brief of USWA at 26-66.

300 *Id.* at 15.

301 42 U.S.C. §2000e-2(a)(1) (1976).

302 42 U.S.C. §2000e-2(d) (1976).

303 401 U.S. 424, 91 S.Ct. 849 (1971).

304 *Id.* at 431, 91 S.Ct. at 853.

305 427 U.S. 273, 96 S.Ct. 2574 (1976).

306 *Id.* at 280, 96 S.Ct. at 2579.

would not permit a racial quota in favor of whites to achieve a desired racial ratio in craft jobs, no inference is permissible that a quota to achieve this goal may be used in favor of minority workers.

The inference of USWA is also contrary to the legislative history of Title VII. In its own brief USWA cites numerous instances of statements that racial quotas of any kind are discriminatory.[307] For instance, Sens. Clark and Clifford P. Case, the bipartisan "captains" for Title VII,[308] introduced an interpretive memorandum stating that "any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race."[309] Sen. Williams stated: "[T]o hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy."[310] The argument of USWA, based solely on inference, cannot overcome specific statements of legislative intent.[311] Therefore, the theory of USWA should be rejected.

307 E.g., Brief of USWA at 43, 43-44, 52.

308 *Id.* at 41.

309 *Id.* at 43; 110 Cong. Rec. at 7213.

310 *Id.* at 52, 110 Cong. Rec. at 8921.

311 The distinction drawn by USWA between statements made prior to and after the introduction of Section 703(j) by Sen. Everett M. Kirksen is meritless. As USWA recognizes, Brief of USWA at 60, Sen. Humphrey stated that "[t]his subsection does not represent any change in the substance of the title . . . ." 110 Cong. Rec. at 12723.

C. *The Discrimination Against White Workers Is Not Validated By Executive Order 11246 or the Affirmative Action Guidelines of the EEOC.*

In a further attempt to support the racial quota for admission into training programs, Kaiser and the Government argue that this program is authorized under Executive Order 11246 and the Government contends that the racial quota is consistent with the affirmative action guidelines of the EEOC.[312] However, these contentions are invalid because the 50 per cent quota nevertheless violates Title VII.

The court of appeals held that the racial quota could not be valid under Executive Order 11246 because it is invalid under Title VII. In the event of a conflict between a statute and an executive order, the statute prevails.[313] The court of appeals stated:

> Whether Kaiser has already met its affirmative action burden or not, we are unable to harmonize the more explicit language of section 703(d), which specifically prohibits racial classification in admission to on-the-job training programs, with the affirmative action imposed here. If Executive Order 11246 mandates a racial quota for admission to on-the-

312 Brief of Kaiser at 30 *et seq.* Brief of the Government at 54 *et seq.*, 40-42.

313 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 (1952).

> job training by Kaiser, *in the absence of any prior hiring or promotion discrimination,* the executive order must fall before this direct congressional prohibition.[314]

The Government has conceded this point, as it "accept[s] the premise that the Executive Order cannot override Title VII if the two conflict. . . ."[315] Kaiser does not question this principle.

In light of the concession that Title VII prevails in the event of a conflict with the executive order, the asserted authorization of the racial quota by the executive order is irrelevant. The racial quota is valid under the statute or it is not. If it is a violation of Title VII, it cannot be authorized by the executive order.[316] In this case, the racial quota is invalid under Title VII because it discriminates against white workers on the basis of race.[317]

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314 563 F.2d at 227.

315 Petition for a Writ of Certiorari in No. 78-436 at 16.

316 If the OFCC regulations are read to require the establishment of "goals" and "timetables" only when "underutilization" is found in designated jobs, and the utilization is determined solely on the basis of the available minority workers with the requisite skills in the local labor force, it is doubtful that underutilization existed in this case. 41 C.F.R. 60-2.11. However, the regulations require the consideration of other factors in the utilization analysis. *Id.*

317 The reliance on authorities approving "affirmative action," such as *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (3d Cir., 1975), *cert. denied,* 404 U.S. 854 (1971), and *Southern Illinois Builders Association v. Ogilvie,* 471 F.2d 680 (7th Cir., 1972), is misplaced. These cases on their face merely approve "goals" established pursuant to executive orders that were balanced so as *not* to discriminate against whites. In *Ogilvie,* the court specifically held that the Ogilvie Plan did not "discriminate against white persons." *Id.* at 686. In the *Contractors Association* case, the federal order at issue precluded reverse discrimination. It stated:

> This commitment is not intended and shall not be used to discriminate against any qualified applicant or employee. Whenever it comes to the bidder's attention that the goals are being used in a discriminatory manner, he must report it to the Area Coordinator for the Office of Contract Compliance of the U.S. Department of Labor in order that appropriate sanction proceedings may be instituted.
>
> 442 F.2d at 164.

The reliance of the Government on the affirmative action guidelines of the EEOC is also misplaced.[318] The guidelines are not entitled to "great deference" under the standard set out in *Skidmore v. Swift & Co.*[319] and approved in *General Electric Co. v. Gilbert.*[320] The Court said:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which

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318 Brief of the Government at 40-42.

319 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944).

320 429 U.S. 125, 141-42, 97 S.Ct. 401, 411 (1976).

give it power to persuade, if lacking power to control.[321]

In this case, as in *Gilbert*, "[t]he EEOC guideline in question does not fare well under these standards."[322] The guidelines were not issued until December 11, 1978, or 14 years after the passage of Title VII. Thus, they do not have the persuasiveness of a contemporaneous administrative interpretation of the statute.[323] Moreover, to the extent that the guidelines authorize preferences to members of minority groups to eliminate racial imbalance, they are inconsistent with the express language of the statute and the decisions of this Court.[324] In addition, the guidelines conflict with previous administrative decisions of the EEOC.[325]

321 323 U.S. 134, 140, 65 S.Ct. 161, 164.

322 429 U.S. at 142, 97 S.Ct. at 411.

323 *Id.*

324 42 U.S.C. §§2000e-2(a), 2000e-2(d); e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971).

325 E.g., EEOC Decision No. 74-106 (1974), CCH Employment Practices Guide ¶ 6427 (In implementing affirmative action, "[r]espondent may not violate Section 703(j) of Title VII which proscribes 'preferential treatment.' "). EEOC Decision No. 75-268, CCH Employment Practices Guide ¶ 6452 (1975) (Exclusions of non-minority candidates "clearly run afoul of Section 703(j) of the Act as well as Title VII's general concern with providing equal job opportunities to all on the basis of individual capabilities."). Both of these decisions cited and relied on *Griggs v. Duke Power Co.*, 401 U.S. 429 (1971) and *Commonwealth of Pennsylvania v. O'Neil*, 5 EPD ¶ 7974 (3d Cir., 1972) affirmed in part, reversed in part on rehearing *en banc*, 473 F.2d 1029 (3d Cir., 1973), where the Third Circuit stated:

> Opening the doors long shut to minorities is imperative, but in so doing we must be careful not to close them in the face of others, lest we abandon the basic principle of non-discrimination that sparked the effort to pry open these doors in the first place.

Id.

Finally, the guidelines were issued after the EEOC entered this litigation and were designed to counter the impact of "the *Weber* decision."[326] They therefore could not be regarded as the interpretation of an objective party. Thus, the guidelines are entitled to little deference in this case.

D. *A Policy Permitting the Advancement of Minority Workers at the Expense of Whites Could Have Adverse and Unmanageable Consequences.*

The standards of review proposed by the petitioners for cases involving preferences to minorities would permit widespread employment discrimination in the United States. USWA would have the Court permit private parties to "voluntarily" establish preferences for minorities at any time to eliminate racial imbalance.[327] The Government advocates a standard that would permit reverse racial quotas in the event of "apparent" past discrimination, but this test in practice requires only that the percentage of minority workers employed in designated jobs be less than the percentage of minority employees in the local labor force.[328] The percentage disparity, under the theory of the Government, would be a prima facie case of past discrimination and would permit the enactment of race preferences.[329]

326 Supplementary Information, Guidelines on Affirmative Action, CCH Employment Practices Guide ¶ 4011.11.

327 Brief of USWA at 14-23.

328 Brief of the Government at 35-42.

329 *Id.* at 40 *et seq.*

This theory is embodied in the OFCC regulations and the EEOC affirmative action guidelines.[330] Kaiser suggests a "zone of reasonableness" standard that would permit racial preferences whenever the employer has reason to believe that society has discriminated against a particular minority group.[331] All of these standards have the benefit of advancing the economic standing of minority classes, but at the cost of damaging the employment expectations of innocent non-minority workers. If any of the proposed standards were adopted by the Court, the adverse consequences could be severe.

The most important damage that would result from a policy to allow racial preferences is the harm to innocent individuals.[332] The white employees in this case acquired their seniority rights only after years of service to Kaiser and membership in USWA. These parties are presumably innocent of any wrongdoing against blacks or other minority groups. Yet under each of the legal standards advocated by the petitioners, these individuals would bear virtually the entire cost of advancing minority groups. This result is ironic because the white employees who are asked to bear this cost are part of the unskilled labor force at Kaiser and occupy the same status as the preferred minority workers. The application of the 50 per cent quota does not eliminate

330 41 C.F.R. Part 60-2; 29 C.F.R. §1608.4.

331 Brief of Kaiser at 45, 39-42.

332 See *Regents of the University of California v. Bakke*, ___ U.S. ___, ___, 98 S.Ct. 2733, 2753 (1978) (Powell, J.).

any economic disparity between these individuals, but instead advances the minority workers at the expense of the whites.

A policy to permit racial preferences to advance the economic standing of minority groups may also kindle racial prejudice.[333] An individual who suffers the loss of seniority rights or employment opportunities solely on the ground of race will be hard pressed to avoid racial resentment. Economic deprivation is felt just as strongly by non-minority employees as by minority workers. In this case, the evidence at the trial suggested that the 50 per cent quota adversely affected the racial attitudes at the plant. Mr. Weber, who was familiar with the attitudes of workers at the plant because of his position as chairman of the union grievance committee,[334] stated that the "racial relations of the white workers toward their black counterparts, black employees at Kaiser, have progressively gotten worse because of the fact that they realize that the company and the Union have a program in effect which uses race to promote employees ahead of themselves."[335] This result is the natural effect of race discrimination that deprives employees of their economic expectations. A policy to permit race preferences can only foster racial disharmony.

333 See *United Jewish Organizations v. Carey*, 430 U.S. 144, 97 S.Ct. 996, 1014 (1977) (Brennan, J., concurring).

334 App., 35.

335 App., 36.

The standards that would allow preferential quotas would also tend to enhance racial stereotypes. "[S]uch a policy may imply to some the recipients' inferiority and special need for protection."[336] Non-minority employees who observe the operation of a racial quota imposed under government regulations requiring preferences to minority classes may conclude that these groups are special wards of the government. Based on the OFCC regulations and EEOC affirmative action guidelines, this conclusion would appear warranted. White employees might also infer incorrectly, however, that the government requirement of preferences is the only means by which minority individuals advance. Thus, a policy of preferential treatment will carry the negative effect of stigmatizing minority workers by reinforcing attitudes that these employees are incapable of advancing on their own merit.

The reliance on the Government's statistical requirements in the hiring or promotion of workers may diminish the incentive of workers to be productive.[337] The free enterprise system depends in part on encouraging employee productivity through incentives. Workers who produce a greater output than their peers traditionally could expect to be rewarded for their efforts through increases in pay or promotions. In this case, advancement is not based strictly on individual achievement, but the seniority criterion does reward the worker for his length of service to the company. Incentives based on length of service should also enhance productivity and efficiency. The denial of this job benefit, on the other hand, diminishes loyalty to the employer and the desire of the employee to perform his tasks efficiently. As Mr. Weber stated:

> The quota system, again, has affected the attitudes of the workers towards productivity in a very bad way because of the fact that it takes away from the initiative of the individual employee to do more, to do one step further, to do all of his job in the best way he knows how, because he knows that even no matter how well he does it, he won't be able to be promoted, because of this 50 percent minority requirement of the company. So, thus, his attitude does affect productivity in a bad way.[338]

In addition, the disharmony fostered by racial classifications may tend to diminish the efficiency of workers.

The approval of policies to prefer minority workers may also produce reactions in society that are harmful and unmanageable. First, if government regulations

336 *United Jewish Organizations v. Carey*, 430 U.S. 144, 174, 97 S.Ct. 966, 1014 (1977) (Brennan, J., concurring).

337 Note, *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1115 (1971).

338 App., 37-38.

that disadvantage white workers on a broad scale are approved, this decision is almost certain to produce a political reaction. With their economic interests at stake, white employees could be expected to coalesce in a political movement designed to recapture equal employment opportunities. These employees conceivably could exercise considerable political power. Politicians who rise to prominence as part of this movement may take actions that in fact achieve more than equality for whites and cause concomitant harm to minorities.[339] In addition, a political movement to bring equal opportunity to white workers is likely to damage the objectives of the equal rights movement by encouraging racial voting patterns and enhancing the importance of racial issues in elections.

Second, the standards proposed by the petitioners may make it more difficult for the courts to protect minorities at some future time when their interests may not be protected by public officials. These standards would require the courts to permit racial classifications when the employer has a reasonable belief that there was past disparate treatment of a specific class. The operation of preferential programs will provide a documented history of disparate treat-

339 This prediction may involve speculation, but it is nevertheless possible. The current posture of the Government in effect is an overreaction in which the Government seeks to achieve more than equality for minority workers.

ment of white workers.[340] Thus, employers and public officials would be permitted in the future to grant preferences to whites to "remedy" past discrimination. Moreover, because Kaiser and the Government propose the abandonment of any standard for the identification of victims of discrimination as a prerequisite for a "remedy," the disparate treatment of some whites could serve as a justification for the advancement of the entire class at the expense of minorities. This effect would not be desirable, yet it would be required under an even-handed application of the standards proposed by Kaiser and the Government.

Our society is best served by the principle of equality. This standard is accepted by the populace and capable of principled application. In addition, it preserves as fundamental the traditional focus on individual merit rather than race or class concepts. While it may appear attractive to depart from this principle in favor of temporary inequality to achieve the statistical parity of all classes, this action could have adverse consequences. Therefore, the proposals of the petitioners should be rejected.

CONCLUSION

The 50 per cent quota of Kaiser and USWA discriminates against non-minority employees. This

340 We know of no standards used by the Government in selecting the currently recognized minority groups. These groups hardly encompass all classes that have suffered discrimination on grounds of race, color, religion or national origin. Moreover, as the designated classes, including females, are more than a majority of the population, white males could validly be deemed a "minority group."

employment discrimination is illegal under Title VII. The racial quota is not designed to correct for past discrimination, but instead seeks generally to advance certain classes of workers because of assumptions about their past treatment by society. The request for the approval of preferential treatment of classes based on race, without reference to personal merit or seniority or previous individual history, is an approach that relies on the collectivized, stereotyped factors that Title VII and the equal protection clause instruct us to ignore. It may be attractive and arguably benign for government planners or corporation and union executives to decree a societal transformation through preferences based on race, but this new discrimination nonetheless has its own victims, no better off than the preferred class, who are called upon to endure the curtailment of opportunity, suffer the economic effects of discrimination, and stomach the elimination of merit as a ground of advancement. This result should not be approved by the Court.

The decision of the court of appeals should be affirmed.

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